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14  
15 UNITED STATES DISTRICT COURT  
16 NORTHERN DISTRICT OF CALIFORNIA

16 INNOVATION VENTURES, LLC and LIVING  
17 ESSENTIALS, LLC,

18 Plaintiffs,

19 -against-

20 PITTSBURG WHOLESALE GROCERS, INC.,  
21 d/b/a PITCO FOODS; PACIFIC GROSERVICE,  
22 INC. d/b/a PITCO FOODS; ARISTOTLE  
23 PERICLES NAVAB; DAVID LUTTWAY; SANTA  
24 MONICA DISTRIBUTING, INC.; MANOUCHEHR  
25 HEIKALI, a.k.a. DAVID HEIKALI; AZIZ  
26 HEIKALI, a.k.a. ED HEIKALI; ELITE  
27 WHOLESALE, INC.; TONIC WHOLESALE, INC.  
28 d/b/a ACE WHOLESALE; KOAMEX GENERAL  
WHOLESALE, INC.; YOUNG H. KIM, a.k.a.  
YONG HWAM KIM; DAPAN USA CORP. d/b/a  
FRONTIER WHOLESALE; SUNG KEUN LEE;  
DAN-DEE COMPANY, INC.; FADI ATTIQ;  
KEVIN ATTIQ; and JOHN DOES 1-10,

Defendants.

[PROPOSED] SEIZURE ORDER

RECEIVED

2012 OCT 26 A 10: 28

RICHARD W. WIEKING  
CLERK, U.S. DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

WHA

Case No. C 12 5523

[PROPOSED] SEIZURE ORDER

FILED UNDER SEAL  
PURSUANT TO 15 U.S.C. § 1116

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1 PLEASE TAKE NOTICE that upon the Complaint of Innovation Ventures, LLC and Living  
2 Essentials, Inc. (together, "Living Essentials" or "Plaintiffs"), the accompanying declarations and the  
3 exhibits annexed hereto, and the memorandum of law submitted in support of this Order, it is  
4 hereby:

5  
6 ORDERED, any law enforcement officers having jurisdiction including without limitation  
7 the United States Marshal, or one or more of his deputies; the San Diego County Sheriff's Office;  
8 the Alameda County Sheriff's Office; the Oakland Police Department; the San Mateo County  
9 Sheriff's Office; the Brisbane Police Department; the Yolo County Sheriff's Office; the West  
10 Sacramento Police; the Santa Clara County Sheriff; the San Jose Police Department; the Los  
11 Angeles County Sheriff; the Santa Monica Police Department; the Los Angeles Police Department;  
12 the Ventura County Sheriff; the Ventura Police Department, and in all cases assisted by one or more  
13 attorneys, private investigators, or agents of Plaintiffs, are directed and permitted, at any time  
14 between the hours of 8:00 a.m. and 11:00 p.m., to search, seize, copy, and sequester at any time, but  
15 no later than seven days (7) from the date of this Order, the following items in the possession,  
16 custody, or control of the following Defendants (together, "Distributing Defendants"): Pittsburg  
17 Wholesale Grocers, Inc., d/b/a Pitco Foods, and Pacific Groservice Inc., d/b/a Pitco Foods, located  
18 at 567 Cinnabar Street, San Jose, California 95110; Santa Monica Distributing, Inc., located at 3180  
19 W. Olympic Boulevard, Santa Monica, California 90404; Elite Wholesale, Inc., located at 12323  
20 Sherman Way, North Hollywood, California 91605; Tonic Wholesale, Inc., d/b/a Ace Wholesale,  
21 located at 1675 South Alameda Street, Los Angeles, California 90021; Koamex General Wholesale,  
22 Inc., located at 18695 East San Jose Avenue, City of Industry, California 91748; Frontier Wholesale,  
23 located at 1725 Wood Place, Ventura, California 93003; Dan-Dee Company, located at 3511  
24 Sweetwater Springs Boulevard, Spring Valley, California 91978; and any other residence or office,  
25 warehouse, truck, van, car, storage facility or other location in their possession, custody or control:  
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28



1 (a) All counterfeit products bearing any of the 5-Hour ENERGY Marks (as defined  
2 below);

3 (b) All business records, invoices, correspondence, e-mails, bank records, cancelled  
4 checks, wire transfers, books of account, receipts, or other documentation relating or referring in any  
5 manner to the manufacture, promotion, publicity, advertising, receiving, acquisition, importation,  
6 return, shipment, purchase, sale, offer for sale, or distribution of any merchandise bearing the 5-Hour  
7 ENERGY Marks whether such information is stored in a written or computerized form, and all  
8 telephone and address directories such as a Rolodex;

9 (c) All documents constituting or concerning communications and transactions between  
10 or among any of the defendants in this action; and it is further

11  
12 ORDERED, that Plaintiffs, on whose behalf the Court issues this Order, will account  
13 completely for all property seized pursuant to this Order and shall compile a written inventory of all  
14 such property and shall provide a copy to the law enforcement authority conducting the seizure, who  
15 shall include such a copy with his return to the Court; and it is further

16  
17 ORDERED, that Plaintiffs' private investigators and attorneys are authorized under the  
18 supervision and with the assistance of law enforcement authority to take all necessary steps to secure  
19 and remove the property described in the preceding paragraphs and located at the addresses stated  
20 herein including but not limited to breaking open, searching, and entering the premises, or vehicle,  
21 or facility in the possession, custody, or control of the Distributing Defendants, and to inspect the  
22 contents of any rooms, closets, cabinets, safes, vehicles, containers, desks, electronic storage  
23 devices, computer drives, desktop computers, laptop computers or documents located on the  
24 premises or any storage rooms located within the same complex as the premises and that the  
25 Distributing Defendants and their employees shall provide all passwords or codes needed to inspect  
26 the contents of any rooms, closets, cabinets, safes, vehicles, containers, desks, electronic storage  
27  
28



1 devices, computer drives, desktop computers, laptop computers, or documents located on the  
2 premises or any storage rooms located within the same complex as the premises; and it is further

3 ORDERED, that Plaintiffs' attorneys may accompany the law enforcement officers to  
4 determine whether an item is covered by the preceding paragraphs and the law enforcement officers  
5 shall follow such attorneys' determination; and it is further

6  
7 ORDERED, that during the seizure authorized herein, each person present who is a  
8 defendant or employed or affiliated with a defendant, shall, upon request by a law enforcement  
9 officer, provide a driver's license or other form of identification; and it is further

10 ORDERED, that Plaintiffs' attorneys may be accompanied by private investigators and/or  
11 computer technicians to obtain copies of documents to be seized that are stored in computerized  
12 form and Plaintiffs' attorneys may also bring with them still camera or video camera operators to  
13 record the seizure; and it is further

14  
15 ORDERED, that Plaintiffs' attorneys shall promptly inspect the items seized, and if any  
16 items are found to be outside the scope of this Order, such items are to be returned within ten (10)  
17 business days of the date the seizure is conducted pursuant to this Order; and it is further

18 ORDERED, that Plaintiffs shall be responsible to the law enforcement officers for all of their  
19 fees and charges incurred in carrying out this Order and shall hold harmless law enforcement  
20 authority and its employees for any and all claims, asserted in any court or tribunal, arising from any  
21 acts, incidents, or occurrences in connection with the seizure and possession of the Defendant's  
22 property, including any third-party claims; and it is further

23  
24 ORDERED, that anyone interfering with the execution of this Order is subject to arrest by  
25 law enforcement authority; and it is further

26 ORDERED, that Plaintiffs post an undertaking *by Monday, October 29th* ~~within five (5) business days of the entry of~~  
27 ~~this Order~~ with the Clerk of the Court in the form of a bond, cash or check in the sum of  
28 \$50,000 as security for the payment of such costs and damages as may be incurred or



1 suffered by any party as a result of a wrongful seizure or wrongfully attempted seizure and such  
2 undertaking, if in the form of check or cash, shall be held in an interest-bearing account; and it is  
3 further

4 ORDERED, that the parties shall appear for a hearing before this Court to confirm this  
5 Seizure Order on November 7, 2012 at 3:00 a.m./p.m.; such date not being  
6  
7 sooner than ten (10) days from the date of this Order and not later than fifteen (15) days from the  
8 date of this Order, absent good cause or consent of all parties; and it is further

9 ORDERED, that any Defendant intending to oppose confirmation of this Order shall file  
10 opposition papers with this Court and personally serve upon Plaintiffs' counsel, Patterson Belknap  
11 Webb & Tyler LLP, at their offices at 1133 Avenue of the Americas, New York, New York 10036,  
12 on or before November 12, 2012, and reply papers shall be filed and served on or  
13 before November 19, 2012; and it is further

14  
15 ORDERED, that pending the hearing to confirm the seizure authorized herein, the Clerk of  
16 this Court is to keep and maintain under seal all papers filed in this action, including this Seizure  
17 Order and the Complaint, and that public scrutiny of such papers shall not be permitted, subject to  
18 Defendants' right to access such papers upon presenting the Clerk of this Court with proper  
19 identification after the seizure authorized herein has been carried out; and it is further

20  
21 ORDERED, that Defendants personally serve upon Plaintiffs' counsel, Patterson Belknap  
22 Webb & Tyler LLP, at their offices at 1133 Avenue of the Americas, New York, New York 10036,  
23 five (5) days before the confirmation hearing scheduled herein, copies, to the extent that the originals  
24 were not seized and sequestered, of all business records, inventory records, invoices, e-mails, bank  
25 records, wire transfers, correspondence, books of account, letters of credit, receipts, or other  
26 documentation relating or referring in any manner to the manufacture, promotion, publicity,  
27 advertising, receiving, acquisition, importation, shipment, purchase, sale, offer for sale, or  
28 distribution of any merchandise bearing the 5-Hour ENERGY Marks, whether such information is

1 stored in a written or computerized form, that are in the possession, custody, or control of  
2 Defendant; and it is further

3 ORDERED, that service of the Seizure Order shall be made at the time of the seizure by  
4 delivering true copies thereof to any person of suitable age found at the premises and that such  
5 service be deemed sufficient service.  
6

7 The Court has granted the foregoing Seizure Order without prior written or oral notice to the  
8 Distributing Defendants for the reasons set forth below:

9 The entry of any Order other than a Seizure Order without notice will not serve to adequately  
10 achieve the objectives underlying the Trademark Counterfeiting Act of 1984;

11 (d) Plaintiffs have not publicized their proposed Seizure Order;

12 (e) Plaintiffs have provided the United States Attorney for the Northern District of  
13 California with notice of their application for a seizure Order pursuant to 15 U.S.C. § 1116(d)(2);  
14

15 (f) Plaintiffs have provided the Court with substantial evidence that Defendants have  
16 used a counterfeit mark in connection with the sale, offering for sale, or distribution of counterfeit  
17 goods;

18 (g) Plaintiffs will incur immediate and irreparable injury if this Court declines to grant a  
19 Seizure Order without notice;

20 (h) The matters subject to said Seizure Order likely will be located at the locations to be  
21 searched;  
22

23 (i) The harm to Plaintiffs should this Court decide not to grant Plaintiffs' motion for a  
24 Seizure Order outweighs any harm which the Distributing Defendants may incur in the event this  
25 Court grants Plaintiffs' motion for a seizure Order; and

26 (j) The Distributing Defendants, or persons acting in concert with them, would likely  
27 destroy, move, hide, or otherwise make inaccessible to the Court the matters which are subject to the  
28 proposed seizure Order if Plaintiffs are required to proceed on notice.



## FINDINGS OF FACT AND CONCLUSIONS OF LAW


The Court issues the foregoing Seizure Order based upon the findings of fact and conclusions of law set forth below.


### Findings of Fact

For use with 5-Hour ENERGY<sup>®</sup>, Living Essentials is the owner of a well-established family of famous trademarks including, among others, the following trademarks that appear on the packaging for genuine 5-Hour ENERGY<sup>®</sup> (collectively referred to herein as the “5-Hour ENERGY Marks”):

(1) Plaintiffs’ “5 HOUR ENERGY” trademark was registered on the Supplemental Register of the United States Patent and Trademark Office on September 27, 2005 as U.S. Registration No. 3,003,077;

(2) Plaintiffs’ “5-HOUR ENERGY” trademark as registered on the Principal Register of the United States Patent and Trademark Office on August 2, 2011 as U.S. Registration No. 4,004,225;

(3) Plaintiffs’  trademark was registered on the Principal Register of the United States Patent and Trademark Office on February 28, 2012 as U.S. Registration No. 4,104,670;

(4) Plaintiffs’  trademark, which includes the wording “5-hour ENERGY” in black outlined in yellow, below which are the words “EXTRA STRENGTH” in yellow, along with a person in black silhouette, outlined in yellow, shown in an athletic pose adjacent to an

1 uneven landscape, with the sky depicted in transitioning colors from  
2 black to red as the sky meets the landscape, was registered on the  
3 Principal Register of the United States Patent and Trademark Office on  
4 March 27, 2012 as U.S. Registration No. 4,116,951;



6  
7  
8 (5) Plaintiffs' trademark, commonly referred to as "Running Man"  
9 was registered on the Principal Register of the United States Patent  
10 and Trademark Office on October 20, 2009 as U.S. Registration No.  
11 3,698,044; and



13  
14  
15 (6) Plaintiffs' trademark, which includes the wording "5-hour  
16 ENERGY" in black outlined in yellow along with a person in black  
17 silhouette, outlined in yellow, shown in an athletic pose adjacent to an  
18 uneven landscape, with the sky depicted in transitioning colors from  
19 red to yellow as the sky meets the landscape, was registered on the  
20 Principal Register of the United States Patent and Trademark Office on  
21 September 17, 2010 as U.S. Registration No. 4.120,360.

22  
23  
24 (Decl. of Matthew S. Dolmage, dated Oct. 25, 2012 ("Dolmage Decl. ") ¶ 10.)

25 (k) The 5-Hour ENERGY Marks symbolize business goodwill of Living Essentials and  
26 are invaluable assets to Living Essentials. (Dolmage Decl. ¶ 18.)

27 (l) In September 2012, a salesman sent Living Essentials bottles of 5-Hour ENERGY®  
28 that he suspected were diverted. (*Id.* ¶ 4.) After closely inspecting the bottles, Living Essentials



1 determined – based on subtle but distinct differences in packaging between the authentic bottles and  
2 the purported counterfeits – that the bottles were not diverted but rather were counterfeits. (*Id.* ¶ 5.)  
3 The most striking difference between the authentic and counterfeit bottles was that the authentic  
4 bottle caps featured a “pimple” mark from the mold, whereas the counterfeit caps did not have this  
5 “pimple” mark. (*Id.*)

6  
7 (m) Living Essentials immediately retained counsel, which conducted an extensive,  
8 nationwide investigation to uncover those responsible for the counterfeits. (*Id.* ¶ 3.)

9 (n) A forensic chemist retained by Living Essentials determined that there were  
10 significant differences between the genuine and the counterfeit product. (Decl. of Erich Speckin,  
11 dated Oct. 24, 2012 (“Speckin Decl.”) ¶ 13.) For example, while authentic 5-Hour ENERGY®  
12 contains 7.8 parts per million of vitamin B<sub>12</sub>, the counterfeit product contains no detectable amount  
13 of that vitamin. (*Id.* ¶ 22.) In addition, the coloring of the counterfeit product is significantly  
14 different from the coloring of the authentic product. (*Id.* ¶¶ 17-18.) Significantly, in contrast to 5-  
15 Hour ENERGY® which has the same pink color regardless of flavor, the counterfeits have different  
16 colors depending on the variety. For example, the counterfeit Orange variety had a pale orange color  
17 whereas the counterfeit Berry was a pale pink. (*Id.* ¶ 18.)

18  
19 (o) As a result of the inferior quality of the counterfeit product, Living Essentials has  
20 received many complaints from customers who purchased product that smelled and tasted different  
21 from the authentic product. (Dolmage Decl. ¶ 7.)

22  
23 (p) Investigators dispatched by counsel for Living Essentials have determined that  
24 counterfeit product has been distributed to retail outlets by each of the Distributing Defendants  
25 named in this Order. (Decl. of Bruce Gerstman, dated Oct. 25, 2012 (“Gerstman Decl.”) ¶¶ 2-4, 6, 8  
26 (Pittsburg Wholesale Grocers, Inc., d/b/a Pitco Foods, and Pacific Groservice Inc., d/b/a/ Pitco  
27 Foods); Decl. of Josh Lichtman, dated Oct. 25, 2012 (“Lichtman Decl.”) ¶¶ 2-6 (Tonic Wholesale,  
28 Inc., d/b/a Ace Wholesale); *id.* ¶¶ 7-8, 10, 15 (Elite Wholesale, Inc.); *id.* ¶ 9 (Santa Monica

1 Distributing, Inc.); *id.* ¶¶ 12-13 (Koamex General Wholesale, Inc.); *id.* ¶¶ 14-16 (Frontier  
2 Wholesale); *id.* ¶¶ 17-25 (Dan-Dee Company).)

3 (q) Plaintiffs have notified the United States Attorney for the Northern District of  
4 California of their request for a Seizure Order. (Decl. of Geoffrey Potter, dated Oct. 25, 2012  
5 (“Potter Decl.”) ¶ 6.)

### 7 Conclusions of Law

8 Faced with “an ‘epidemic’ of commercial counterfeiting,” Congress enacted the  
9 Counterfeiting Act to provide a meaningful remedy to victims of counterfeit trafficking. *See* S. Rep.  
10 No. 98-526, 98th Cong., 2d Sess. 5 (1984), reprinted in 1984 U.S.C.C.A.N. 3627, 3631 (*citing*  
11 *Montres Rolex, S.A. v. Snyder*, 718 F.2d 524, 528 (2d Cir. 1983), *cert. denied*, 465 U.S. 1100  
12 (1984)). The Counterfeiting Act permits a court to grant an *ex parte* order of seizure in “[c]ivil  
13 actions arising out of [the] use of counterfeit marks,” including “records documenting the  
14 manufacture, sale or receipt” of the counterfeit goods. 15 U.S.C. § 1116(d)(1)(A). *See Reebok Int’l,*  
15 *Ltd. v. Marnatech Enters.*, 970 F.2d 552, 558 (9th Cir. 1992) (noting that lower court properly  
16 granted *ex parte* seizure order under section 1116, which “explicitly authoriz[es] the prejudgment  
17 seizure of counterfeit goods” and related documentary evidence); *Tanning Research Labs., Inc. v.*  
18 *Worldwide Imp. & Exp. Corp.*, 803 F. Supp. at 608 (*ex parte* order of seizure granted pursuant to  
19 Section 1116). The purpose of allowing plaintiffs to proceed *ex parte* against known counterfeiters  
20 is “[t]o provide trademark owners with an effective means of combatting this lawless behavior.”  
21 1984 U.S.C.C.A.N. at 3628. As Congress explained in the Senate Report accompanying this bill,  
22 “[t]he reason for this provision is that many counterfeiters, once given notice that their fraudulent  
23 operations have been discovered, will immediately dispose of the counterfeit goods and make it  
24 impossible for the trademark owner ever to bring them to justice.” *Id.* at 3629.



1 A plaintiff must satisfy seven statutory criteria before a court can grant an *ex parte*  
2 order of seizure under Section 1116. *See* 15 U.S.C. § 1116(d)(4)(B). As demonstrated below and in  
3 the declarations accompanying Plaintiffs' application, Plaintiffs have met each requirement.  
4

- 5 1. "An order other than an *ex parte* seizure order is not adequate  
6 to achieve the purposes of section 1114 of this title"

7 As recognized by Congress in enacting the Counterfeiting Act, counterfeiters are  
8 more likely than not to dispose of or conceal the counterfeit goods when confronted with a  
9 trademark action. 130 Cong. Rec. H 12076, 12080 ("[M]any of those who traffic in counterfeits  
10 have become skilled at destroying or concealing counterfeit merchandise when a day in court is on  
11 the horizon."). It is this possibility, ever-present in any counterfeiting case, that justifies immediate  
12 and *ex parte* action to obtain the evidence needed to prove a violation of the Trademark Act.  
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1           There is clear evidence that the Distributing Defendants sold counterfeit 5-hour  
2 ENERGY® featuring counterfeits of Plaintiffs' valid, protectable trademarks. The Distributing  
3 Defendants are "using" 5-Hour ENERGY Marks by selling counterfeit 5-hour ENERGY® products  
4 in counterfeit packages that are nearly identical to authentic 5-hour ENERGY® bottles and  
5 packaging. The Distributing Defendants either knew, or should have known, that their conduct was  
6 unlawful. Through an extensive, nationwide investigation, Plaintiffs have purchased from the  
7 Distributing Defendants (and/or from entities that purchase 5-Hour ENERGY® products through the  
8 Distributing Defendants) product bearing counterfeit marks, as that term is defined in 15 U.S.C. §  
9 1116(d)(1)(B). Because the Distributing Defendants' conduct can result in criminal prosecution,  
10 there is a very real risk that the Distributing Defendants will destroy or conceal the evidence of their  
11 misconduct – including the purchase and sale documentation and the inventory itself – if put on  
12 notice of this action and given the ordinary amount of time to respond to a conventional discovery  
13 request.  
14

15  
16           2.     "The applicant has not publicized the requested seizure"

17           Plaintiffs have not publicized the requested seizure. (Potter Decl. ¶ 6). Furthermore,  
18 as set forth in the accompanying proposed order, all papers in support of Plaintiffs' application for *ex*  
19 *parte* relief are to be kept under seal by the Clerk of this Court pending the effectuation of the  
20 seizure order.  
21

22           3.     "The applicant is likely to succeed in showing that the person against whom  
23 seizure would be ordered used a counterfeit mark in connection with the sale,  
24 offering for sale, or distribution of goods or services"

25           As demonstrated above, Plaintiffs have submitted evidence that the Distributing  
26 Defendants are distributing, selling and offering for sale counterfeit 5-Hour ENERGY®. Given this  
27 indisputable evidence, Plaintiffs have met their burden of demonstrating the likelihood of success on  
28



1 the merits of their counterfeiting claim and need not advance any additional proof to satisfy this  
2 statutory criterion.

3  
4 4. "An immediate and irreparable injury  
will occur if such seizure is not ordered"

5 The counterfeits are currently being distributed and sold at retail stores across the  
6 country. Each and every sale of 5-hour ENERGY® further erodes the good will and reputation  
7 associated with this product. Plaintiffs will thus continue to suffer irreparable harm – and consumers  
8 will remain at risk of buying adulterated and ineffective product – until the Court puts a stop to the  
9 continued sale and distribution of these counterfeits. Seizing the product and the paper trail  
10 currently in the Distributing Defendants' possession is a necessary first step, both to prevent these  
11 defendants from continuing to sell it and to identify others who may be involved. Until that  
12 happens, plaintiffs are being, and will continue to be, irreparably harmed.

13  
14  
15 5. "The matter to be seized will be located  
at the place identified in the application"

16 The following addresses were identified by investigators working at the direction of  
17 counsel for Living Essentials as addresses currently used by the Distributing Defendants.

18  
19 Pittsburg Wholesale Grocers, Inc., d/b/a Pitco Foods

20 Based on information obtained by Plaintiffs' investigators, Pacific Groservice Inc.,  
21 d/b/a/ Pitco Foods, is currently operating out of 567 Cinnabar Street, San Jose, California 95110.

22 (Gerstman Decl. ¶ 8.)

23  
24 Pacific Groservice Inc., d/b/a/ Pitco Foods

25 Based on information obtained by Plaintiffs' investigators, Pacific Groservice Inc.,  
26 d/b/a/ Pitco Foods, is currently operating out of 567 Cinnabar Street, San Jose, California 95110.

27 (Gerstman Decl. ¶ 8.)  
28

1                   Santa Monica Distributing, Inc.

2                   Based on information obtained by Plaintiffs' investigators, Santa Monica  
3 Distributing, Inc. is currently operating out of 3180 W. Olympic Boulevard, Santa Monica,  
4 California 90404. (Lichtman Decl. ¶ 12.)  
5

6                   Elite Wholesale, Inc.

7                   Based on information obtained by Plaintiffs' investigators, Elite Wholesale, Inc. is  
8 currently operating out of 12323 Sherman Way, North Hollywood, California 91605. (Lichtman  
9 Decl. ¶ 7.)  
10

11                   Tonic Wholesale, Inc., d/b/a Ace Wholesale

12                   Based on information obtained by Plaintiffs' investigators, Tonic Wholesale, Inc.,  
13 d/b/a Ace Wholesale, is currently operating out of 1675 South Alameda Street, Los Angeles,  
14 California 90021. (Lichtman Decl. ¶¶ 3, 5.)  
15

16                   Koamex General Wholesale, Inc.

17                   Based on information obtained by Plaintiffs' investigators, Koamex General  
18 Wholesale, Inc. is currently operating out of 18695 East San Jose Avenue, City of Industry,  
19 California 91748. (Lichtman Decl. ¶ 11.)  
20

21                   Frontier Wholesale

22                   Based on information obtained by Plaintiffs' investigators, Frontier Wholesale is  
23 currently operating out of 1725 Wood Place, Ventura, California 93003. (Lichtman Decl. ¶ 10.)  
24

25                   Dan-Dee Company  
26  
27  
28



1 Based on information obtained by Plaintiffs' investigators, Dan-Dee Company is  
2 currently operating out of 3511 Sweetwater Springs Boulevard, Spring Valley, California 91978.  
3 (Lichtman Decl. ¶ 17.)  
4

5 6. "The harm to the applicant of denying the application outweighs the  
6 harm to the legitimate interests of the person against whom seizure  
7 would be ordered of granting the application"

8 The Distributing Defendants have no legitimate interest in selling, offering for sale, or  
9 otherwise distributing counterfeit 5-Hour ENERGY®, and therefore cannot suffer any harm.  
10 Plaintiffs, on the other hand, have a very strong interest in protecting the public's health and safety  
11 and their marks from the adulterated counterfeits that the Distributing Defendants are selling.

12 7. "The person against whom seizure would be ordered, or persons acting  
13 in concert with such person, would destroy, move, hide, or otherwise make  
14 such matter inaccessible to the court, if the applicant were to proceed on  
15 notice to such person"

16 By selling counterfeit 5-Hour ENERGY®, the Distributing Defendants may have  
17 knowingly and intentionally engaged in a criminal act. See 18 U.S.C. § 2320. Given the specter of  
18 criminal prosecution, there is a real risk that the Distributing Defendants will destroy records and  
19 inventory to cover up their unlawful conduct. As Congress noted, "many of those who traffic in  
20 counterfeits have become skilled at destroying or concealing counterfeit merchandise when a day in  
21 court is on the horizon." 130 Cong. Rec. H12076, at 12080. It is for this reason (among others) that  
22 Congress created heightened tools and remedies to combat counterfeiting, including the remedy of  
23 an *ex parte* seizure.

24  
25   
26 UNITED STATES DISTRICT JUDGE

27 Issued: October \_\_, 2012 at \_\_ o'clock \_\_m.  
28